

Federal Communications Commission

DA 00-1428

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Availability of INTELSAT Space Segment
Capacity to Users and Service Providers Seeking
To Access INTELSAT Directly

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IB Docket No. 00-91

ORDER ADOPTING PROTECTIVE ORDER

Adopted: July 5, 2000

Released: July 5, 2000

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we require Comsat Corporation (Comsat) to disclose certain information it claims to be confidential pursuant to the protective order included as Attachment A to this Order, and we reschedule the deadline for filing reply comments and responses to reply comments in the above-captioned proceeding. By this action, we protect the confidentiality of competitively sensitive information, while enabling other parties to participate adequately in this rulemaking proceeding.

II. BACKGROUND

2. On May 24, 2000, the Commission directed Comsat Corporation (Comsat) to submit certain information that the Commission needs to meet the Congressional mandate established in Section 641 of the Open-Market Reorganization for the Betterment of International Telecommunications Act (ORBIT Act).¹ In particular, the ORBIT Act directs the Commission to determine whether "users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements."²

3. The *Notice* directed Comsat to identify, for each of 13 existing and seven planned INTELSAT satellites listed, the capacity that Comsat (1) now has in service; (2) holds but does not have in service, (3) holds under a guarantee reservation; and (4) holds under a first refusal reservation.³ The *Notice* also

¹ Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2002), *to be codified at* 47 U.S.C. § 761 *et seq.* The ORBIT Act adds Title VI, entitled "Communications Competition and Privatization," to the Satellite Communications Act of 1962, 47 U.S.C. §§ 701 *et seq.*

² Section 641(b) of the ORBIT Act, 47 U.S.C. § 765(b).

³ Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly, Notice of Proposed Rulemaking, IB Docket No. 00-91, FCC 00-186 (released May 24, 2000) (*Notice*) at para. 22.

required Comsat to identify capacity on future satellites intended to satisfy existing long-term contracts.⁴ In addition, Comsat was required to explain the extent to which it reserves capacity in anticipation of renewal of existing long-term contracts.⁵ Finally, Comsat must identify capacity on future satellites for which it has no explicit customer requirements.⁶

4. The *Notice* stated that, if Comsat regards some of this committed capacity information as commercially sensitive, the Commission would consider a request for confidential treatment filed pursuant to Section 0.459 of the Commission's rules.⁷ Comsat submitted two versions of its comments, one with commercially sensitive information redacted. Comsat also submitted a timely request for confidential treatment of its unredacted comments.

III. DISCUSSION

A. Request for Confidentiality

5. We grant Comsat's request for confidentiality. Parties seeking access to the information in the unredacted comments may have such access, however, provided they execute the protective order attached as Appendix A to this Order. As the Commission explained in the *Confidential Information Policy Order*, it generally does not afford confidential treatment to material submitted in rulemaking proceedings, because such treatment could deprive other interested parties of meaningful notice and opportunity to comment, as required by the Administrative Procedure Act.⁸ In particular, the Commission concluded that parties filing comments in a rulemaking proceeding may not deprive other interested parties of an opportunity to challenge the information.⁹ Accordingly, the Commission stated that it would consider requests to disclose information to parties who have executed a protective order, but deny almost all other requests for confidential treatment of information in rulemakings.¹⁰ Pursuant to the policy set forth in the Commission's *Confidential Information Policy Order*, therefore, we require Comsat to provide copies of its unredacted comments to all parties participating in this proceeding and executing the Protective Order attached to this Order.

⁴ *Notice* at para. 22.

⁵ *Notice* at para. 22.

⁶ *Notice* at para. 22.

⁷ *Notice* at para. 22, citing 47 C.F.R. § 0.459 (governing requests for confidential treatment).

⁸ Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GEN Docket No. 96-55, Report and Order, 13 FCC Rcd 24816, 24843-44 (paras. 43-44) (*Confidential Information Policy Order*), citing Section 553(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b).

⁹ *Confidential Information Policy Order*, 13 FCC Rcd at 24844 (para. 44), citing *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission*, 555 F.2d 82, 95 (D.C. Cir. 1977).

¹⁰ *Confidential Information Policy Order*, 13 FCC Rcd at 24844-45 (para. 45).

B. Pleading Cycle

6. Currently, reply comments are due on July 6, 2000, and responses to reply comments are due on July 11, 2000.¹¹ In order to give interested parties adequate opportunity to respond to the information in Comsat's unredacted comments, we extend the pleading cycle on our own motion. Reply comments are now due on July 19, 2000, and responses to reply comments are now due on July 24, 2000.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that we will disclose the information that Comsat has requested to keep confidential only to parties who have executed the Model Protective Order adopted in the *Confidential Information Policy Order*, and attached to this Order.

8. IT IS FURTHER ORDERED that interested parties in this proceeding MAY FILE reply comments on or before July 19, 2000, and responses to reply comments on or before July 24, 2000.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau

¹¹ Notice at para. 37.

ATTACHMENT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Availability of INTELSAT Space Segment
Capacity to Users and Service Providers Seeking
To Access INTELSAT Directly

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IB Docket No. 00-91

PROTECTIVE ORDER

Adopted: July xx, 2000

Released: July xx, 2000

This Protective Order is intended to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from Comsat Corporation (Comsat) and which is privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. This Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

1. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in paragraph seven.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets or commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information; and (iii) information that the Commission has allowed to be examined off-site and that otherwise complies with the requirements of this paragraph. Confidential Information includes additional copies of and information derived from Confidential Information.

- d. Declaration. "Declaration" means Appendix A to this Protective Order.
- e. Reviewing Party. "Reviewing Party" means any interested party participating in the rulemaking initiated in Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly, Notice of Proposed Rulemaking, IB Docket No. 00-91, FCC 00-186 (released May 24, 2000).
- f. Submitting Party. "Submitting Party" means Comsat.

2. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R §§ 0.459 & 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by Comsat from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, Comsat shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Party, or if the Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to the Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to the Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement or if they execute the attached Declaration.

6. Counsel to the Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized

Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

- a. Counsel for the Reviewing Parties to this proceeding, including in-house counsel actively engaged in the conduct of this proceeding, and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;
- b. Specified persons, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; or
- c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. Inspection of Confidential Information. Confidential Information shall be maintained by Comsat for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice (generally not to exceed one business day) during normal business hours.

9. Copies of Confidential Information. Comsat shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty-five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to Comsat upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

10. Filing of Declaration. Counsel for the Reviewing Party shall provide to Comsat and the Commission with a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed.

11. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review) unless otherwise ordered by the Commission or a court of competent jurisdiction, shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Pleadings Using Confidential Information. Comsat and the Reviewing Party may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;
- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: " Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly, IB Docket No. 00-91;" and
- d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, Comsat, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal. They shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to Comsat and an opportunity to comment on such proposed disclosure). If Comsat or the Reviewing Party file a pleading containing Confidential Information, they shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. Comsat or the Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c of this paragraph is not removed.

13. Violations of Protective Order. Should the Reviewing Party, after it has properly obtained access to Confidential Information under this Protective Order, violate any of its terms, it shall immediately convey that fact to the Commission and to Comsat. Further, should such violation consist of improper disclosure or use of Confidential Information, the Reviewing Party shall take all necessary steps to remedy the improper disclosure or use. ADEC shall also immediately notify the Commission and Comsat, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to Comsat at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. Termination of Proceeding. Unless otherwise ordered by the Commission or a court of competent jurisdiction, within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of the Reviewing Party shall destroy or

return to Comsat all Confidential Information as well as all copies and derivative materials made. Authorized Representatives shall certify in a writing served on the Commission and Comsat that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to the Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party and other attorney work product. Any confidential information contained in any copies of pleadings retained by counsel to the Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by Comsat of any privilege or entitlement to confidential treatment of such Confidential Information. The Reviewing Party, by viewing these materials: (a) agrees not to assert any such waiver; (b) agrees not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agrees that accidental disclosure of Confidential Information shall not be deemed a waiver of any privilege.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of Comsat to apply for additional or different protection where it is deemed necessary or to the rights of the Reviewing Party to request further or renewed disclosure of Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party executing the attached Declaration, and the Submitting Party, Comsat Corporation.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

APPENDIX A

DECLARATION

In the Matter of)	
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Capacity to Users and Service Providers Seeking)	IB Docket No. 00-91
To Access INTELSAT Directly)	
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I, _____, hereby declare under penalty of perjury that I have read the Protective Order in the above referenced proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with Comsat Corporation, the Submitting Party.

(Signed) (Date)

(Printed name)

(Representing)

(Title)

(Employer)

(Address)

(Phone)